SUPREME COURT
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No. 10-197

IN THE SUPREME COURT
OF THE UNITED STATES

CHRISTA FAREED BAUER, PETITIONER

V.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT

ON PETITION FOR REHEARING OF DENIAL ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

Per Rule 44
#A097-597-220

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October 29, 2010

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CHRISTA FAREED BAUER,
Petitioner,

v.

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On Petition for Rehearing of Denial On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR REHEARING

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PETITIONER ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 44.1

I, Allan H. Bell, counsel for Petitioner, Christa Fareed Bauer, and a member of the Bar of this Court, hereby certifies as follows:

1. That Petitioner's Petition for Writ of Certiorari was denied by the Honorable Court on October 4, 2010.

2. That after reviewing said denial, together with new developments in case law, Petitioner respectfully submits that there exists a good faith basis for petitioning the Honorable Court to rehear her Petition based on these new developments.

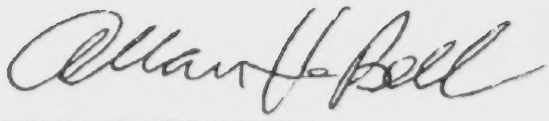
3. That in addition to said good faith basis for same, consistent with Supreme Court Rule 44.1, undersigned duly admitted counsel states that this Petition is not submitted for delay.

4. The grounds for this Petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

5. Undersigned counsel certifies that this Petition for Rehearing complies with Supreme Court Rule 33 (Document Preparation-Formats), and Rule 34 (Document Preparation - General Requirements)

WHEREFORE, undersigned counsel respectfully requests the Honorable Court for its Order permitting the filing of Petitioner's accompanying Petition for Rehearing of Denial on Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, and for such other relief as the court may deem just and proper.

Dated: October 29, 2010



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QUESTION PRESENTED

Whether the court, due to findings in the six week old Second Circuit holding in *Luna v. Holder*, Jr, 2010 WL 344786 (2nd Cir. 2010), should determine that Due Process includes a Sixth Amendment right to effective counsel, as applied to legal representation provided by non-attorney, government-accredited representatives, with a consideration of such in *Padilla*?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Court of Appeals for the Seventh Circuit were Petitioner, Christa Farced Bauer, and Respondent, Attorney General of the United States.

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QUESTION PRESENTED

Whether the court, due to findings in the six week old Second Circuit holding in *Luna v. Holder, Jr*, 2010 WL 344786 (2nd Cir. 2010), should determine that Due Process includes a Sixth Amendment right to effective counsel, as applied to legal representation provided by non-attorney, government-accredited representatives, with a consideration of such in *Padilla*?

INTRODUCTION/OVERVIEW

When fully considering Petitioner's Petition for Rehearing, et al herein, this Honorable Court is particularly asked to consider the urgent, unmet need for providing Due Process via guidance to wholly U.S. government-authorized immigration legal services, particularly by non-attorneys, to lawfully admitted aliens (such as Petitioner) who often lack knowledge of such a bedrock, constitutional entitlement.

Attached hereto as Pet. App. A, is an excerpt from a *Fordham Law Review* article, published November, 2009, that fully plumbs the depth of constitutionally deficient, immigration legal representation problems facing such lawfully admitted aliens, especially when provided by non-attorneys.

As in the well known, recent case of *Padilla v. Kentucky*, 130 S.Ct. 1473 (March 31, 2010), said aliens, including Petitioner, are often stuck at the bottom of the well of ineffective assistance of counsel

(IAC) as a result of acts - or nonacts - by a government-authorized Accredited Representative (A.R.), in lieu of licensed attorneys. These actions have clearly and often caused the alien to be improperly removed/deported, "... a dreadful punishment..." per Judge Hand in *Klonis v. Davis*, 13 F.2d 630 (2nd Cir. 1926). The *Fordham* article, authored by Prof. Careen Shannon, an Adjunct Professor of Immigration Law at Benjamin Cardozo School of Law, combined with the recent *Padilla* and *Luna* cases described below, offer a ray of hope of finally lighting the Due Process route. Prof. Shannon leads off at p. 577 (Pet. App. A), by stating that:

> "Immigrants are often easy prey for bogus or incompetent attorneys, "notarios", scam artists, and other bad actors who take advantage of immigrants' limited knowledge of U.S. law, lack of English fluency, and lack of cultural knowledge to charge exorbitant fees for wild promises of green card and citizenship, that the bad actors cannot - or in some cases never intended to - deliver. Such exploitation is merely a symptom, however, of the larger problem of inadequate access to competent legal counsel by a foreign national seeking to navigate our labyrinthine scheme of immigration laws, regulations, and policies. Contrary to popular belief, not all of these foreign nationals are "illegal aliens" who slipped over our southern border; many are entitled to obtain lawful immigration status [such as Petitioner], if only they had adequate guidance from qualified counsel to help them seek it.

To aid in this consideration, this Court is urged to fully consider the ramifications of the following:

A. This Court's holding in *Padilla v. Kentucky*, 130 S. Ct. 1473 (March 31, 2010) at p.1 of the opinion, per Justice Stevens, holding that the alien's "claim was subject to the *Strickland* 466 U.S. 668, 688, 694 (1984) ineffective assistance [of counsel] test, not only to extent that [s]he alleged affirmative misadvice, but also to extent that [s]he alleged omission by counsel...;" citations of abrogated cases omitted.

B. The holding of the Second Circuit Court of Appeals on September 3, 2010, per Judges Pooler, Calabresi, and Chin, in *Luna v. Holder*, Jr, *Id.*, that, at p.7 thereof, states "...an ineffective assistance of counsel claim is a constitutional claim that arises under the Due Process Clause of the Fifth Amendment citing *Omar v. Mukasey* , 517 F.3d 647, 650 (2nd Cir. 2008). Omar concerned ineffective assistance of counsel by a non-attorney (A.R.) in an immigration context. As defined/detailed below, Judge Pooler went on to recite, also at p. 7, a claim in *Luna* "that the government prevented a petitioner from filing a timely petition for review..." NOTE: The Court can take judicial notice that the EOIR - Executive Office of Immigration Review is part of the U.S. Department of Justice, an agency of the American government.

C. Thus, Petitioner clearly meets Prof. Shannon's above description of "easy prey."

That is because, as detailed in the Statement of The Case below, the lawfully admitted Petitioner who has now been married to her USC active duty Navy husband for about five years, has been denied adjustment to that of permanent resident because she missed her asylum court hearing. That was because, similar to Prof. Shannon's article, Petitioner obviously received IAC when her non-attorney fully accredited (by the U.S. Government's) Executive Office of Immigration Review a/k/a EOIR told Petitioner to skip the hearing because the A.R. would cancel it due to the purported superior filing for permanent residence the A.R. had made on behalf of Petitioner's sailor husband and Petitioner, again via the A.R., for $400.

The problem as highlighted by Justice Stevens, Judge Pooler in *Luna,* Judge Katzmann in *Omar, Id.* and emphasized by Prof. Shannon, was and is that there is apparently little to be done about the A.R.'s bad advice. (The A.R. is not an attorney, so no bar complaint is possible. Petitioner's approximate 11 month old complaint to the EOIR had, after about six months, elicited no response, though recently she received a general reply that the complaint is being investigated).

Serious, life/liberty-impacting trial errors by an A.R. have arisen. Parallel to Judge Pooler's comments in *Luna, Id.* that (per *Omar, Id,* a claim of government action posing a barrier to the alien's Due Process rights), apparently grew from a handful of

such instances, in 2005, when Petitioner's travail began) exponentially to June 1, 2010, all "under the radar".

And thus Petitioner's Petition for Rehearing, herein.

Petitioner's original Petition for Writ of Certiorari, was denied October 4, 2010. Since that June 15, 2010 filing, however, the landscape of Respondent's predicament dramatically changed with Judge Pooler's Decision of September 10, 2010, and the ability to consider same together with Prof. Shannon's timely law review article.

This introduction is designed to spotlight badly needed Supreme Court intervention to inject Due Process, by finding that ineffective assistance of counsel, as in the instant case, by an A.R., can constitute exceptional circumstances to permit the reopening of a case, on an equitable tolling basis, when equities support the Motion.

OPINIONS/COURT ORDERS BELOW

In Petitioner's case: the *in absentia* Order of Removal by the Immigration Judge of November 28, 2005 (Pet. App. B), Order of the BIA dated July 31, 2008 dismissing Appeal (Pet. App. C), Seventh Circuit Decision dated November 23, 2009, denying appeal (Pet. App. D), Order of the U.S. Court of Appeals dated January 12, 2010 denying Petition for Rehearing (Pet. App. E). Order of the U.S. Supreme Court of October 4, 2010, denying the Petition for Writ of Certiorari to the Seventh Circuit Court of

Appeals (Pet. App. F).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). Also, S.Ct. Rule 44 pertaining to this Petition for Rehearing, et al.

STATUTORY BACKGROUND

The Immigration and Nationality Act (INA) allows a court of appeals considering a final order of removal pursuant to 8 U.S.C. §1252 to review "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien." *Id.* §1252(b)(9). IN IIRIRA however, Congress amended the INA to preclude judicial review of any "decision or action of the Attorney General..., the authority for which is specified under this subchapter to be in the discretion of the Attorney General..., other than the granting of asylum. *Id* § 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to subchapter II of Chapter 12 of Title 8 of the United States Code, which includes §§1151-1381.

In the "subchapter " reference to-specifically, 8 U.S.C. §1229 (a)(1) - Congress, among other things vested the IJ s with the general authority to "conduct proceedings for deciding the inadmissibility or deportability of an alien."

STATEMENT OF THE CASE

[Restated from Petition for Writ, et al, with relevant attached appendix exhibits omitted in this Petition For Rehearing, et al]

Petitioner arrived from Zambia in the Greenbelt, Maryland, USA area on July 24, 2000, on a B-2 visitor visa [lawfully admitted, exactly the same as in the seminal case - that cries out for reversal - of *Fong Yue Ting v. United States,* 149 U.S. 698, 730 (1893). There she met with a non-attorney, immigration free-lancer, Mr. Emanuel Chembe, who took her money, forged her signature to the first Asylum Application in this case on August 27, 2003 and later filed the relevant Asylum Application on November 5, 2003, and twice filed same with the (now) USCIS without her knowledge (prior mooted case #09-1280). She concedes receiving notice of an Immigration Court hearing in Kansas City, due to the second fraudulent filing, from where this case originated. Soon after, on approximately November 12, 2004, she received an ICE Notice to Appear for an immigration hearing in Kansas City on said forged asylum application.

Well, prior to the above November 28, 2005 *in absentia* hearing, she married USC Qasim Fareed, a highly decorated Naval Officer, on December 31, 2004. She next visited a local charity office, an EOIR (thus government) - accredited agency, that has a well deserved history of providing low cost, routine immigration legal assistance to aliens such as Petitioner, in March, 2005. The agency via its A.R. provided assistance in preparing and eventual filing

of a routine I-130/I-485 joint petition by the two of them to adjust her status with her husband.

During her several appointments with the Petitioner's voluntary agency and with the assistance of an EOIR-Accredited Representative (A.R.) of the agency, later identified by her initials as M.O., she and her husband prepaid all USCIS filing fees, an A.R. service fee of $400, and discussed with the A.R. the Petitioner's pending removal hearing at the Immigration Court scheduled for July 5, 2005. The A.R. (formerly known as a Volag, parlance for volunteer agency) told Petitioner that she would prepare and file the I-130/I-485 papers requested and paid for, and for Petitioner, *pro se*, to request a continuance from the IJ of her first hearing date of July 5, 2005. She did, and her case was postponed to November 28, 2005.

The A.R. filed Petitioner's I-130/I-485 joint petition on November 17, 2005. The A.R. also told Petitioner she didn't have to appear at the November 28, 2005 hearing, because she was properly married to a USC, the A.R. had filed papers to adjust her status to permanent residence well before the hearing, and the IJ would be alerted to this filing so as to routinely continue her hearing. Petitioner was informed of all information in the preceding sentence by this A.R., who was permitted to practice immigration law by federal regulations, in USCIS/EOIR proceedings, *supra*; and that said A.R. would also request such a continuance of the November 28, 2005 hearing which she said she had done by means of a letter she sent, as an A. R. of Petitioner, to the U.S. Asylum Office in Chicago on

November 9, 2005.

Entirely relying on the A.R.'s advice, who she trusted 100% more than the earlier described Maryland confidence man, Petitioner did not attend the November 28, 2005 hearing. The IJ, seeing that Petitioner was not in attendance, issued a removal order to -egads!- Zimbabwe, determining, among other things, that this was also an *in absentia* hearing, though Petitioner had received notice of the hearing.

Petitioner was oblivious and unsuspecting of the IJ's order of removal of November 28, 2005, because, per the A.R.'s above-referenced assurances of early-November, 2005, she received a receipt notice dated November 17, 2005, that her adjustment petition had been received from the USCIS, and to report to the USCIS in Kansas City on January 10, 2006, for a routine fingerprinting . She received a USCIS notice form I-797C, approximately March 2, 2006, for Petitioner and her USC husband to appear at the USCIS office in Kansas City on April 24, 2006. This was for a routine interview, generally the final step in Petitioner obtaining adjustment of status to that of a permanent resident. This notice, on the face of it, was mailed to Petitioner c/o A.R. M.O., at the "JVS" (A.R.'s) place of business. Petitioner and her husband were thrilled with anticipation.

Unfortunately, soon after March 14, 2006, the USCIS sent a letter to the same A.R. M.O., stating that Petitioner's case was closed - - - because she was "the subject of a final removal order.." due to her involvement "in [the above] removal proceedings".

Further, Petitioner was informed via the A.R., dated April 10, 2006, that her I-485 interview - marked "filed November 17, 2005," 11 days before the so-called missed Immigration Court hearing - had been "canceled due to unforseen circumstances." The A.R. belatedly, after many, unreturned Petitioner complaint calls to her, in July 2006, learned that she had been ordered deported.

Petitioner, and via her USC husband, attempted to protest the March 14, 2006 action to the A.R. via many calls. In other words, and contrary to the IJ's remarks on this point in the denial of Petitioner's Motion to Reopen, Petitioner and her husband simply never heard back from their timely complaints to the A.R. and her agency. Petitioner was well aware of the A.R.'s volunteer, charitable, low cost activities, and did not wish to cause trouble for the M.O. - nor other needy aliens. The Petitioner learned in mid July, 2006 that A.R.'s letter to the USCIS of November 9, 2005, withdrawing Petitioner's USCIS asylum application , (the basis for the November 28, 2005 IJ hearing), was clearly meant to cancel that hearing because, as the letter stated, "Christa hired me to represent her in her application to change and adjust her status through the marriage with her USC husband ...". Of strong importance, was that this letter, sent to the USCIS, was signed by the A.R. M.O. as "BIA Accredited". The A.R. offered no help. As stated in Petitioner's affidavit, the A.R. though given an opportunity to respond to Petitioner's complaints of IAC, did not do so.

Petitioner, via undersigned attorney, filed her

Motion to Reopen with the IJ on September 26, 2006, 176 days after she first learned, via the above USCIS case closure letter, of the said IJ's *in absentia* removal order. This was well within the statutory 180 days deadline to file a motion to reopen, which is unlimited for an *in absentia* hearing. There is unlimited time, statutorily, to file a motion to reopen where an *in absentia* hearing, as here, according to the IJ, particularly where exceptional circumstances, such as IAC are shown, per 8 C.F.R. sec. 1003.2(g). Also see *Singh v. Gonzalez*, 436 F.3d 484 (5th Cir. 2006).

Thus, Petitioner is now seeking reversal or remand to the lower courts on a denial of Due Process per *Reno v. Flores*, 507 U.S. 292, 306 (1993), and due to ineffective assistance counsel (IAC), based on exceptional circumstances, per *Padilla, Id.*

ARGUMENT/REASONS FOR GRANTING THE WRIT

Where a government-actor A.R. provided IAC to a lawfully admitted alien, the Fifth and Sixth Amendment implications should be adhered to, according to Judge Pooler in the opening paragraph, p. 2 of his Second Circuit decision in *Luna, Id.*:

> Petitioners Worklis *Luna* and Tasmann Anthony Thompson [same as Respondent] have filed petitions for review of final orders of removal issued by the Board of Immigration Appeals ("BIA"). The government has moved to dismiss the petitions as untimely. Petitioners *Luna* and Thompson [i.e.

> Respondent] concede that their petitions are untimely, but allege that "circumstances beyond their control-[ineffective assistance of counsel and circumstances created by the government, respectively]-prevented them from filing timely petitions for review..at p. 10.

Then according to Justice Stevens in *Padilla, Id.* at p. 4 thereof:

> To satisfy *Strickland's* two-prong inquiry, counsel's representation [Sixth Amendment] must fall "below an objective standard of reasonableness," 466 U.S., at 688, 104 S. Ct. 2052, and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694, 104 S. Ct. 2052 .... And this Court has recognized the importance to the client of "'[p]reserving the...right to remain in the United States [Fifth Amendment]'" and "preserving the possibility of' discretionary relief from deportation. *INS v. St. Cyr*, 533 U.S. 289, 323, 121 S.Ct. 2271, 150 L.Ed.2d 347.

Then, in *Omar, Id.*, according to Judges Katzmann, Kearse and Calabresi at p. 651, the BIA is still propounding standards on how to handle complaints to the Government's EOIR to handle client complaints of IAC.

Finally, Prof. Shannon, at p. 621, fn. 208, Pet. App.A a3, found herself reaching way back. As

Justice Stevens did in *Padilla, Id.*, she quoted Justice Fields from his dissent in the epic case of *Fong Yue Ting v. U.S.*, 149 U.S. 69, 759 (1893), where he stated: "As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence and the breaking up of all the relations of friendship, family and business..."

To end the nightmares described in *Luna,* Padilla, *and* Omar, *Id.*, caused by an A.R., this Court is urged to hold that such IAC violates the Fifth and Sixth Amendments, and is an exceptional circumstance to justify tolling the 180 day motion to reopen deadline, and remand this case to the BIA or trial court for further proceedings, as appropriate.

SUMMARY

The words of Prof. Shannon, at p. 622, Pet. App. A, a4, of her article, totally echo undersigned counsel's thoughts that he hopes this Honorable Court will ponder when considering Christa Fareed Bauer's plight: "[we should be]...restoring a sense of integrity to an aspect of our [immigration] law that does not currently reflect the ideals of justice on which our nation was founded."

CONCLUSION

For the significant policy reasons stated above, Petitioner respectfully urges the Honorable Court to grant the Petition for Rehearing of Denial on Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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